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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/714,467	11/14/2003	Kevin D. Jorczak	7690-0001	2499

23980 7590 11/03/2008

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EXAMINER	
DOUGLAS, STEVEN O	

ART UNIT	PAPER NUMBER
3771	

MAIL DATE	DELIVERY MODE
11/03/2008	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No.	Applicant(s)	
	10/714,467	JORCZAK ET AL.	
	Examiner	Art Unit	
	/Steven O. Douglas/	3771	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE *3* MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *17 October 2008*.

2a)☐ This action is **FINAL**. 2b)☒ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1-49* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1-49* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO/SB/08) Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____ .
5) ☐ Notice of Informal Patent Application
6) ☐ Other: _____.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

Claims 1-13,16,17,20-26,28,30 and 32-49 are rejected under 35 U.S.C. 103(a) as being unpatentable over Aylsworth et al. (US 5,890,490).

The Aylsworth et al. reference discloses a therapeutic gas delivery device substantially as claimed including a source of therapeutic gas 3, a delivery tube 11, a valve 13, means for automatically adjusting the rate of fluid flow (see process flow chart in Figure 8), and a remote control unit 35 that is connected to the system by a modem, radio frequency transmission or fiber optics, but fails to exclude any means for automatically adjusting the rate of fluid flow as claimed. It would have been obvious to one of ordinary skill in the art at the time the invention was made to exclude any means for automatically adjusting the rate of fluid flow, since it has been held that omission of an element and its function in a combination where the remaining elements perform the same functions as before involves only routine skill in the art. *In re Karlson, 136 USPQ 184.*

In regard to claim 5, see disclosure of pure oxygen (col. 3, lines 58-59).

In regard to claim 10, the system is considered to include an implied translator in order for the control signals of the device to operate the valve.

In regard to claim 16, the remote control unit is capable of being held/gasped by the hand of a user.

In regard to claim 17, it is implied that the remote control unit would be operated at least in part by the fingertips of a user.

In regard to claim 20, it is implied that since the remote control unit includes monitoring capabilities (i.e. like that of a computer) that a digital display would be included.

In regard to claims 23-26, Examiner takes the position that the remote control unit is capable of operating within the claimed ranges.

In regard to claim 30, it is implied that the system would operate from a source of AC power since AC is most readily available in most homes and hospitals.

In regard to claim 32, see col. 2, lines 55-59.

In regard to claims 44-48, the method as claimed would inherent during the normal use and operation of the Aylsworth et al. device as modified by the cited case law above.

In regard to claims 13 and 22, the Aylsworth et al. reference fails to disclose the associated control signals and display as being analog. Examiner takes Official Notice that analog technology (i.e. signals and displays) is conventionally known especially as being an alternate to digital technology. Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to substitute analog technology (i.e. including the control signals and display) for the digital nature of Aylsworth et al, wherein so doing would amount to the mere substitution of one signal and display format for another that would work equally as well as Noticed by Examiner.

In regard to claims 34 and 35, the Aylsworth et al. reference fails to disclose an additional remote control unit. It would have been obvious to one of ordinary skill in the art at the time the invention was made to include an additional remote control unit, since it has been held that mere duplication of the essential working parts of a device involves only routine skill in the art. *St. Regis Paper Co. v. Bemis Co., 193 USPQ 8.*

Claims 14 and 15 are rejected under 35 U.S.C. 103(a) as being unpatentable over Aylsworth et al. (US 5,890,490) as applied to claim 9 above and further in view of Petersen et al. (US 6,616,606).

The Aylsworth et al. reference discloses a therapeutic gas delivery device substantially as claimed (supra), but fails to disclose frequency hopping (i.e. operation on plural frequencies). The Petersen et al. reference discloses another medical monitoring system that utilizes frequency hopping technology (see col. 8, lines 10-19) to insure uninterrupted wireless signal exchange in localities with multiple frequency exchanges with respect to electrical devices taking place (i.e. a hospital environment). Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to modify the Aylsworth et al. device to incorporate frequency hopping technology in view of the teachings of the Petersen et al. reference to insure uninterrupted wireless signal exchange in localities with multiple frequency exchanges with respect to electrical devices taking place (i.e. a hospital environment).

Claims 18 and 19 are rejected under 35 U.S.C. 103(a) as being unpatentable over Aylsworth et al. (US 5,890,490) as applied to claim 1 above and further in view of Applicant's admitted prior art (see page 6, line 18 to page 7, line 2 of Applicant's response filed 11/5/07).

The Aylsworth et al. reference discloses a therapeutic gas delivery device substantially as claimed (supra), but fails to disclose sound or voice recognition associated with the remote control unit as claimed. Applicant has admitted that sound/voice recognition technology is conventionally known. Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to modify the remote control unit of Aylsworth et al. to incorporate sound/voice recognition technology in view of Applicant's admission of conventionality to facilitate hands-free use of the device.

Claims 27 and 29 are rejected under 35 U.S.C. 103(a) as being unpatentable over Aylsworth et al. (US 5,890,490) as applied to claim 1 above and further in view of Kirsch et al. (US 6,763,832).

The Aylsworth et al. reference discloses a therapeutic gas delivery device substantially as claimed (supra), but fails to disclose the valve as including a motor or an explosion-proof container as claimed. The Kirsch et al. reference discloses another therapeutic gas delivery device that utilizes a solenoid-operated (i.e. motor) valve disposed in an explosion-proof container for implied safety reasons (see col. 8, lines 16-36). It would have been obvious to one of ordinary skill in the art at the time the invention was made to employ a solenoid (i.e. motor-operated) valve as, for example, shown by Kirsch et al. for the broadly disclosed valve of Aylsworth et al. wherein so doing would amount to the substitution of one type of valve for

another that would work equally as well. Kirsch et al. further teaches implied added safety because the valve and motor is encased in an explosion-proof container.

Claim 31 is rejected under 35 U.S.C. 103(a) as being unpatentable over Aylsworth et al. (US 5,890,490) as applied to claim 30 above and further in view of Bowen et al. (US 7,225,809).

The Aylsworth et al. reference discloses a therapeutic gas delivery device substantially as claimed (supra), but fails to disclose a battery backup. The Bowen et al. reference discloses another medical condition monitoring device having a battery backup to insure operation of the device in the event of a power failure (see col. 10, line 60 to col. 11, line 4). Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to include a battery backup with the Aylsworth et al. device in view of the teachings of Bowen et al. insure operation of the device in the event of a power failure.

Response to Amendment

The Declaration of Richard Vaz under 37 CFR 1.132 filed 10/17/08 is sufficient to overcome the rejection of claims 1-49 based upon 35 USC 112, first paragraph (enablement).

Response to Arguments

Applicant's arguments with respect to claims 1-49 have been considered but are moot in view of the new ground(s) of rejection.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to /Steven O. Douglas/ whose telephone number is (571) 272-4885. The examiner can normally be reached on Mon-Thurs 6:30-5:00.

The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Steven O. Douglas/
Primary Examiner
Art Unit 3771

SD
10/30/08